82-490

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES E. DAVIS, PETITIONER

VS.

JOHN W. GOODSON, RESPONDENT

Petition for Writ of Certiorari

to the Supreme Court of Arkansas

C. Wayne Dowd
1206 State Line Av.
Texarkana, AR 75502
ATTORNEY FOR
PETITIONER
501-774-5191

QUESTIONS PRESENTED

1.) Whether the right to be free from compulsory self-incrimination and the right to counsel should protect an attorney from punishment for contempt when the attorney in open court advises a client concerning these rights.

2.) Whether the ruling of the Respondent finding Petitioner in contempt of Court denied Petitioner due process of law.

INDEX

Page

QUESTIONS PRESENTED..... 1

OPINION BELOW..... 5

JURISDICTION..... 5

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED..... 6

STATEMENT OF THE CASE..... 10

REASONS FOR GRANTING THE WRIT..... 14

CONCLUSION AND PROOF OF SERVICE.... 22

APPENDIX..... 24

TABLE OF AUTHORITIES

Argersinger v Hamlin 407 U.S. 25 (1972)..... 15

Dennison v Mobley 257 Ark. 216, 515 S.W. 2d 215 (1974)..... 21

Gideon v Wainwright 372 U.S. 335 (1963)..... 15

In Re: Winship 397 U.S. 358 (1970). 20

Jackson v Virginia 443 U.S. 307 (1979)..... 20

Miranda v Arizona 384 U.S. 436 (1966)..... 15

Mullaney v Wilbur 421 U.S. 684 (1975)..... 20

Ark. Stat. 34-901..... 7

Ark. Stat. 34-902..... 8

Ark. Stat. 75-1045(a)..... 8

Ark. Stat. 75-1045(d)..... 8

Arkansas Rules of Criminal Procedure
Rule 18.1 (a)..... 9

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES E. DAVIS, PETITIONER

VS.

JOHN W. GOODSON, RESPONDENT

Petition for Writ of Certiorari

to the Supreme Court of Arkansas

Petitioner, James E. Davis, respectfully prays that a Writ of

Certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas which was rendered in this proceeding on June 21, 1982, and the Order of said Court overruling Petitioner's timely Motion for Rehearing which was entered on July 19, 1982.

OPINION BELOW

The opinion and judgment of the Supreme Court of Arkansas appears in the appendix in this petition. The same is reported at _____ Ark. _____ and 635 S.W. 2d 226.

JURISDICTION

This case arises from a summary punishment for contempt of court. The Petitioner is an attorney and the Respondent is a Circuit Judge of the State of Arkansas. On November 3, 1981, the Respondent found the Petitioner to

be in contempt of court and imposed sentence of twenty-four hours in jail and $250.00 fine. Several hours later the Arkansas Supreme Court ordered Petitioner's release pending appeal. On June 21, 1982, the Supreme Court of Arkansas affirmed the ruling of the Circuit Court. Petitioner filed a timely Motion for Rehearing which the Court denied on July 19, 1982. This Petition for Writ of Certiorari was filed within sixty days of the later date. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3) in that Petitioner asserts deprivation of rights secured to him by the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1.) This case involves the Fifth,

Sixth and Fourteenth Amendments to the United States Constitution.

2.) This case also involves the following provisions of Arkansas law:

Ark. Stat. 34.901 provides:

> "Every Court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others.
>
> First. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
>
> Second. Any breach of peace, noise or disturbance, directly tending to interrupt its proceedings.
>
> Third: Wilful disobedience of any process or order, lawfully issued or made by it.
>
> Fourth, Resistance, wilfully offered, by any person, to the lawful order or process of the Court.
>
> Fifth. The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory."

Ark. Stat. 34-902 provides:

"Punishments for contempt may be by fine or imprisonment in the jail of the county where the Court may be sitting, or both, in the discretion of the Court; but the fines shall in no case exceed the sum of fifty dollars ($50.00), nor the imprisonment ten (10) days. Courts shall always have power to imprison until their adjournment; and when any person shall be committed to prison, for the non-payment of any such fine, he shall be discharged at the expiration of thirty (30) days."

Ark. Stat. 75-1045(a) provides in part:

"Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of subsection (c) of this section, to a chemical test or tests of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor."

Ark. Stat. 75-1045(d) provides in part:

"If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in paragraph (a) of this section, none shall be given. . ."

Arkansas Rules of Criminal Procedure, Rule 18.1(a) provides:

"Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the defendant to:

(i) appear in a line-up or show up;
(ii) speak for identification by witnesses to an offense;
(iii) be fingerprinted;
(iv) pose for photographs not involving reenactment of a scene;
(v) try on articles of clothing;
(vi) permit the taking of specimens of material under his fingernails;
(vii) permit the taking of samples of his blood, hair, and other materials of his body which involve no unreasonable intrusion thereof;
(viii) provide specimens of his handwriting; and
(ix) submit to a reasonable physical or medical inspection of his body."

STATEMENT OF THE CASE

The events which started this litigation occurred on November 3, 1981, in the Circuit Court of Miller County, Arkansas located in Texarkana, Arkansas. The Circuit Court is the court of general jurisdiction. The Respondent is the Circuit Judge. The Petitioner is a licensed attorney.

The Court session on this day served the purpose of arraignment and scheduling for trial in felony cases. Generally, all persons with a pending felony charge were required to attend. Upon a case being called, each Defendant approached the bench with counsel. The Court would arraign the accused if it had not done so previously. Then the Court would either continue the case or schedule the case for trial and for hearing on motions if required.

Among those cases called was State of Arkansas vs. Arlis Ray Brown, number CR-81-73, wherein the Defendant was charged with the offense of failure to appear. When the case was called, the Petitioner, who had previously been appointed by the Court to represent the Defendant, approached the bench and advised the Court that arraignment had already occurred. The Respondent, upon seeing the Defendant, expressed the opinion that the Defendant was drunk and after Defendant denied drinking any intoxicants that day, stated, "Let's take a breatholyzer and see. Go with the sheriff." The Petitioner attempted to object on Fifth Amendment grounds. His objection was interrupted by the Respondent Court stating: "Because he is staggering and coming around here in open Court and I asked him if he had anything to drink and he says he

hadn't." The Petitioner then turned to his client and advised him that he did not have to take the test. The Respondent Court then stated, "Yes, he will take the test, Mr. Davis. Mr. Sheriff, take him down. Now, if you want to get an order to stop me, you go ahead and get one, sir. But when I order one here in front, don't you tell somebody they don't have to do it." Petitioner stated, "He's my client, Your Honor. I can advise him what I see fit, If I'm wrong--"

After the test results showed Arlis Ray Brown to have a reading of .08, the Respondent Court sentenced both Brown and Petitioner for contempt of Court.

In the Courts below Petitioner contended that his conduct was not contemptuous because he was in good faith attempting to advise his client concerning the client's Fifth Amendment

rights. Petitioner also contended that the court's order either misstated or failed to state what the Petitioner had done which allegedly amounted to contempt. Implicit in these arguments is the contention that the Fifth and Sixth Amendment rights of an accused entitle an attorney without fear of reprisal to advise a client that these rights exist and apply in a given context. Apart from the obvious unfairness in being judged by one's accusor, due process requires that the findings of a court imposing penal sanctions must be supported by the evidence. The Supreme Court of Arkansas has itself recognized the proper presentation of constitutional issues by its order staying its mandate pending disposition of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1.) This Court should grant certiorari to determine whether an accused's right to counsel and right to be free from compulsory self-incrimination entitle an attorney to advise the client that such rights apply in a given situation.

The majority opinion of the Arkansas Supreme Court recites the in-court exchange leading to the judgment of contempt. When the Petitioner's client denied having had intoxicants on his appearance day, the court directed him to go with the sheriff and take a breath test. The Petitioner tried to make an objection on Fifth Amendment grounds which the Court interrupted. The Petitioner then advised the client that he did not have to take the test. Before sentence was imposed the Petitioner again tried to

explain his position to the court. Again, the court interrupted and imposed sentence.

The Fifth Amendment right against complusory self-incrimination and the Sixth Amendment right to counsel entitle an attorney to advise the client to refuse to give evidence against himself. If Miranda v Arizona 384 U.S. 436 (1966), Gideon v Wainwright 572 U.S. 335 (1963), and Argersinger v Hamlin 407 U.S. 25 (1972) are to have any meaning for the protection of one charged with crime, then an attorney must have an unfettered right to tell his client to refuse to give evidence against himself. Fortunately for the Petitioner's client, the judge did not order him to confess to any unsolved murder for there would be no difference in doing so and breathing into a breath test machine. In either instance the accused is

ordered to give evidence against himself which could (and did) result in punishment.

The decision of the Court below modifies the Miranda warning as follows: "You have the right to remain silent and the right to consult an attorney but if your attorney tells you that you should remain silent, he will be placed in jail."

The only authority in Arkansas law for the administration of a breath test for intoxication is Ark. Stat. 75-1045 which states that one who drive a motor vehicle gives implied consent to such a test. Even in this context, the law requires that no test be given if the driver refuses. Also, there is no law in Arkansas establishing implied consent to a breath test for those who are compelled to be in court. The only enactment which even may come close is

Arkansas Rules of criminal Procedure, Rule 18.1(a) which does not specifically allow a court to order a breath test for intoxication. Clearly the Petitioner in advising his client that he did not have to take the test, stated to his client a reasonable interpretation of existing law.

That the Petitioner gave advise to the client in open court rather than outside its hearing should make no difference. Given a choice in such a bizarre situation, what attorney would prefer a swearing match with the sheriff about what he said over the record of a court reporter.

One cannot study the opinions of this Court and state appellate courts about the right against compulsory self-incrimination without concluding that the subject is far more complex than an indigent layman can understand.

One cannot dispute that Fifth Amendment rights are often not perceived in a given situation by even those who are schooled in constitutional law much less by those who are not. Why else would this Court require the assistance of counsel to anyone who stands to lose his liberty? Clearly, the right to counsel means the right to counsel who can without sanction tell his client to refuse to give the State the evidence with which the client can be convicted.

The dissenting opinion in the Court below stated the Petitioner's argument in a nutshell: "The issue is whether an attorney can advise a client in good faith as to what he believes the law to be without fear of being thrown in jail." Hopefully, there will never be enough cells to house those lawyers who tell a client that he does not have to give evidence against himself.

If the right to counsel and the right against compulsory self-incrimination are to have any real meaning, this Court cannot allow an inferior court to establish a chilling effect on the exercise of those rights by approving the incarceration of a lawyer who tells his client: "Wait, there may be a Fifth Amendment problem here and you can refuse to cooperate." The opinion in Miranda explains far better than this writer the relationship of the Fourth, Fifth and Sixth Amendments. These rights are meaningless if they cannot be asserted by an accused or by an attorney acting in his behalf.

This case presents the Court the opportunity to reaffirm that in our free society, an attorney will not be punished for representing a client and advising him according to the attorney's

good faith understanding of the law. The Writ of Certiorari should be granted for this reason alone.

2.) This Court should grant certiorari to determine whether Petitioner was denied due process of law by being punished for contempt of court when the evidence supporting such a ruling was insufficient.

Due process requires that when punishment is imposed for any conduct the evidence that such conduct occurred must be sufficient. Jackson v Virginia 443 U.S. 307 (1979), In Re: Winship 397 U.S. 358 (1970), Mullaney v Wilbur 421 U.S. 648 (1975).

Regretably, the only fact findings of the trial court are in abbreviated form written on the docket sheet of the client's case as follows:

> "Def appeared drinking - intoxilyzer test ordered - Atty Davis in open ct. told def not to

take the test....Davis found in contempt - fine 250 and 24 hr in jail -"

It is interesting to compare these "findings" of the Court to Ark. Stat. 34-901 to determine what if anything the Petitioner did that amounted to contempt of Court. It is an intellectual challenge to compare the Court's "findings" with the record (restated in the opinion of the Arkansas Supreme Court) to find where the Petitioner in the words of the Respondent "told Def (sic) not to take the test".

It is respectfully submitted that no rational trier of the facts could find the Petitioner's guilt beyond a reasonable doubt. That guilt of contempt of court must be proven beyond a reasonable doubt has long been established in Arkansas. Dennison v Mobley 257 Ark. 216, 515 S.W. 2d 215

(1974). The "subjective state of near creditude" enunciated in Jackson v Virginia precludes any finding that the Petitioner acted contemptuously.

CONCLUSION

Wherefore, Petitioner prays that this Court issue it Writ of Certiorari to the Supreme Court of Arkansas to review the decision below and that upon plenary consideration that the judgment below be reversed.

Respectfully submitted,

C. Wayne Dowd
1206 State Line Avenue
Texarkana, AR 75502
501-774-5191
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been forwarded to the Attorney General of

Arkansas, counsel for Respondent, in the U.S. Mail, postage pre-paid, this the 16th day of September, 1982.

C. Wayne Dowd

C. Wayne Dowd